Department of Law Monthly Report

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In This Issue

Environmental

STATES PREVAIL IN PESTICIDE PREEMPTION CASE

Last October, Alaska led a group of states and the territory of American Samoa in filing an amicus brief supporting the State of New York in *Terminix International Co. v. Crotty*, a test case in the Southern District of New York. The case was a declaratory judgment action in which the world's largest pest control company sought to extend federal preemption over most state and local permitting and regulation of pesticide use. The case also presented the issue of whether federal courts should take jurisdiction over pesticide enforcement controversies already joined in state court. In October 2002, U.S. District Judge Kimba Wood, ruled in the states' favor on the jurisdictional ground and dismissed the case. Terminix has appealed. AAG Chris Kennedy is coordinating the amicus effort.

Fair Business Practices

OCCUPATIONAL LICENSING

MEDICAL BOARD SUSPENDS ANCHORAGE PHYSICIAN

On October 24, 2002, the State Medical Board summarily suspended the license of another Anchorage osteopathic physician pursuant to AS 08.64.331(c), based on a finding that he poses a clear and immediate danger to public health and safety. The doctor failed to comply with the board's August 1, 2002, order to undergo psychiatric/psychological and medical evaluations in order to determine his ability to practice medicine in a manner consistent with public safety. The August order was based on a petition filed by the Division of Occupational Licensing stating that the doctor was self medicating with Zoloft, had made suicidal statements, and had prescribed large quantities of narcotics to a female patient. With regard to this patient, the doctor also filled the prescriptions himself and then hid them in a trash bin in his office parking lot and under a rock near the patient's home for her to pick up. The suspension will remain in effect until the evaluations are completed and the board has the opportunity to review the results. The doctor has requested a hearing with regard to the suspension. AAG Robert Auth is representing the Division of Occupational Licensing in the hearing process.

REGULATORY COMMISSION OF ALASKA

RCA DEFEATS ACS' ATTEMPT TO DEPRIVE IT OF JURISDICTION

In July, ACS of Anchorage and Fairbanks filed an emergency petition with the Federal Communications Commission (FCC) asking the FCC to preempt the RCA's jurisdiction under the Telecommunications Act of 1996. Under the Act, incumbent local telecommunications carriers like ACS are required to open their local markets to competition, and state regulatory commissions like the RCA are tasked with overseeing the implementation of competition and disputes arising over it. The Act also provides for FCC preemption where state commissions "fail to act."

The RCA adjudicated disputes in Anchorage and Fairbanks between ACS and GCI. ASC, unhappy with the results, claimed in its FCC petition that decisions made by the RCA were at odds with federal law and, as such, by acting allegedly in violation of federal law, the RCA had "failed to act," justifying FCC preemption.

In response, the RCA was successful in convincing the FCC that a "failure to act" for preemption purposes does not include situations where a state commission makes a decision that a telecommunications carrier is unhappy with. The FCC denied ACS' petition on October 22, 2002, leaving intact the RCA's jurisdiction.

CONSUMER PROTECTION

$120,000 IN CIVIL PENALTIES ORDERED IN CONSUMER PROTECTION CASE

On October 22, 2002, Judge Michalski granted the state's motion for default judgment in *State v. Northern Lights Alaska & Canada Tours and Heinz Schulz.* The complaint alleges that the defendants violated the Unfair Trade Practices and Consumer Protection Act by deceptively marketing and selling travel services to consumers across the country and by defrauding small businesses in Alaska. Defendant Schulz promoted his travel business over the internet and required consumers to make payment for travel services via wire transfer. In some cases, consumers arrived in Alaska to find that the vouchers he issued were phony and that he had never made reservations or paid for the services requested. The defendants failed to answer the complaint. The default judgment orders defendants to pay $23,852 in restitution, $120,000 in civil

penalties, and $5,622 in attorneys' fees. AAG Cynthia Drinkwater handled this case.

Governmental Affairs

ALASKA LABOR RELATIONS AGENCY DECISION AFFIRMED

The Public Safety Employees Association ("PSEA") charged that the state committed an unfair labor practice by conditioning an offer to settle an employee's contractual grievance on a release of the employee's statutory and tort claims in a related lawsuit. The Alaska Labor Relations Agency, relying on National Labor Relations Board precedent, concluded that this practice was not prohibited as an unfair labor practice. PSEA appealed. Judge Sharon Gleason affirmed the agency. Finding that the issue implicated the agency's special expertise, Judge Gleason applied the rational basis test and concluded that a rational basis supported the agency's decision. She noted the national board's reasoning that conditioning a settlement on release of other claims was a way to achieve the lawful goal of avoiding future litigation while observing the union's special status as the employee's exclusive representative under the employment agreement. Judge Gleason also addressed the mootness doctrine. The question was whether the appeal was moot because an arbitrator had considered and denied the grievance underlying the unfair labor practice charge. She concluded that the dispute had not lost its character as a live controversy because the union had argued that the grievance should never have been arbitrated.

ARBITRATION DECISION BARS WHISTLEBLOWER ACT CLAIM

Judge Sharon Gleason found that an arbitration decision barred a complaint under the Alaska Whistleblower Act, ruling in favor of the state in its motion for summary judgment. The employee had raised the whistleblower claim first in a grievance handled by her union. After a hearing, the arbitrator granted part of the grievance but denied part of it, finding that the state had just cause to impose significant discipline but not to dismiss the employee. The arbitrator ordered the employee reinstated but without pay for the period between the dismissal and the decision. The court found that the employee was bound by the arbitrator's decision, reasoning that a valid and final award in arbitration should have the same preclusive effect as a judgment of the court under the doctrine of *res judicata* and collateral estoppel, and dismissed the complaint with prejudice.

1998 CHALLENGE TO LINDAUER CANDIDACY IS MOOT IN 2002

The Alaska Supreme Court affirmed two superior court decisions in a memorandum opinion and judgment related to a challenge to the candidacy of John Lindauer based on alleged campaign disclosure violations. The court affirmed Judge Brian Shortell's early stay of the action to allow the Alaska Public Offices Commission to address the allegations first in an administrative complaint raising similar charges. It also affirmed Judge Stephanie Joannides' order dismissing the complaint under the mootness doctrine following the election of another candidate.

NO WAIVER OF SOVEREIGN IMMUNITY, THEREFORE PREJUDGMENT INTEREST NOT AVAILABLE IN ADMINISTRATIVE APPEALS

North Star Hospital sought prejudgment interest against the state on the amount of money that was awarded as the result of an administrative appeal of its Medicaid payment rate. The Alaska Supreme Court affirmed Judge Gleason's decision holding that administrative appeals are not encompassed with AS 09.50.250, and therefore prejudgment interest is not available under that statutory provision. The court found that *Danco Exploration v.*

State, 924 P2d. 432 (Alaska 1996) controlled. North Star Hospital could not recover prejudgment interest against the state because Medicaid payment rate claims did not constitute a cognizable claim under AS 09.50.250. The legislature has not waived sovereign immunity in payment rate challenges brought under the Administrative Procedures Act.

WRONGFUL DISCHARGE SUIT RESOLVED

A former employee of the Department of Corrections accepted the state's offer of judgment in a wrongful-discharge suit. The state made its offer of judgment for $10,000 after Judge William Morse ruled that a union's agreement to settle the former employee's grievances is binding on the former employee unless he proves that the union breached its duty of fair representation in handling or settling the grievances. After attempting to negotiate a settlement for a higher amount, the former employee accepted the state's offer of judgment rather than signing a settlement agreement and release.

Human Services

ANOTHER UNPUBLISHED CINA DECISION

The Alaska Supreme Court continued its recent trend of deciding child in need of aid appeals by unpublished memorandum opinion and judgments that cannot be cited as precedent. In *D.H. v. DFYS* (MO&J #1105, Oct. 16, 2002) the court affirmed the superior court's decision terminating the father's parental rights. The father claimed that his history of violent outbursts and substance abuse did not endanger his children because: (1) he had never hurt the children (ignoring the fact that, due to his extensive jail stays and the requirement that any contact with his children be supervised, he had never had an opportunity to hurt them); (2) his new wife could take care of his kids and would probably leave him if he were to harm them; and (3) despite relapsing numerous times following attempts at rehabilitation, he planned to participate in a new type of treatment, available only out-of-state, which would likely lead to his sobriety. The court bought none of this and terminated his parental rights based upon the danger evident from his extensive history of violence and substance abuse. The father didn't help his case by declaring that, when drinking, "I'm a time bomb waiting to explode." AAG Kevin Williams did the trial and AAG Mike Hotchkin handled the appeal.

ANOTHER ACTIVE MONTH FOR FAIRBANKS HUMAN SERVICES

The Fairbanks Human Services section had numerous trials in the month of October, some of which were resolved by offers of proof.

AAG Taylor-Welch was contacted by the district attorney's office in Marin County, California. A mother from California had absconded with her two boys, bringing them to Alaska without the permission of the father, in direct violation of the California court's custody order. The father had had no contact with his boys for one year. Two Marin County DA investigators were sent to Alaska to retrieve the children in accordance with UCCJEA. AAG Taylor-Welch's attempt to register the foreign judgment *ex parte* was denied by a Fairbanks judge, delaying the investigators' return. After several days in Fairbanks awaiting a positive ruling by the judge, one of the investigators returned to Marin County. In the meantime, the mother was arrested in Fairbanks. Bail was set at $100,000. The other investigator remained in Fairbanks to experience the 7.9 earthquake. Finally, she was forced to return to California without the boys. After numerous court filings by AAG Taylor-Welch several court hearings, and the mother being arrested and served all of the pleadings while in jail, the judge signed the writ of assistance. An investigator returned to Alaska and retrieved the children and returned them to their father in California. The investigator reported that the children were very

hungry so he treated them to dinner where they got to order anything their heart desired. He reported that the boys ate voraciously! The boys were happy to be reunited with their father and all is well on the California home front. The Fairbanks District Attorney's Office is handling the fugitive from justice case on the mother.

AAG Alicia Porter reports that she was able to get a relinquishment in a balloon case on October 8, 2002. She has been busy preparing for at least two trials per week in October, many of which were resolved before trial.

AAG R. Poke Haffner has settled into her new office in the Human Services section and has been busy in court all month.

AAG Gayle Garrigues has settled into her new office and is a welcome addition to the Human Services section. Her extensive trial experience and prosecution background are proving to be valuable assets in her new job. Gayle tried a termination trial on a case involving several boxes of discovery. The judge granted termination immediately after the closing arguments.

IMPACT OF '98 LAW ON TERMINATIONS

In responding to a request from the court system about any changes in the rate of termination cases since amending the CINA laws in 1998, Jan Rutherdale noticed the following trend:

> "Before 1999, it was rare in Southeast to have a contested termination trial, only about one case a year per full-time attorney. For the first few years after the law went into effect, the Juneau office was trying the older balloon cases, with a contested rate of 2-3 cases per attorney per year.
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> "This year, the Juneau attorneys have tried none of the older cases (ones that have been around for longer than 22 months), but have had 4-6 contested cases per attorney, all of which have taken place within the time frames of the new law (*i.e.,* the children have been in out-of-home placements 15-22 months prior to the termination trial).
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> "Although the rate of contested cases has increased, it's taking less time to try them, perhaps because the cases have been in the system less time and therefore are less complicated.
>
> "Since this analysis was not requested, it's unknown if the rate of contested versus uncontested termination hearings have increased, but this seems likely."

Legislation/Regulations

"NEG-REG" WORKS; CRUISE SHIP POLLUTION REGULATIONS APPROVED FOR FILING

During October 2002, the Legislation and Regulations section approved for filing the first comprehensive use of the negotiated regulation statutes to develop regulations for monitoring of cruise ship pollution. The Department of Environmental Conservation (DEC) with the assistance of the Anchorage assistant attorneys general in the Environmental section diligently worked with a "neg-reg" committee appointed by DEC to facilitate the development of these important regulations. After the regulatory process and review was completed, the project was approved for filing in October. Congratulations to all involved in the project.

OTHER REGULATIONS

The section spent the month of October conducting final review of numerous regulations

projects, including Division of Election precinct regulations, Department of Revenue child support regulations, numerous occupational licensing regulations, Department of Natural Resources shallow gas fee regulations, Department of Corrections standards for sex offender treatment programs, Department of Education and Early Development child care program regulations, and Department of Environmental Conservation non-tank vessel spill response regulations. The section also completed a legal sufficiency review to send the pending Alaska coastal management program consistency review regulations to the federal government for consideration.

Natural Resources

ANCHORAGE PERSONNEL

Assistant Attorney General Sabrina Fernandez resigned in October. Sabrina plans to relocate to the Seattle area. We are sorry to lose her. On a more cheerful note, Anne Williams joined our section as a Law Office Assistant. We welcome Anne.

NEW REGULATORY CYCLE BEGINS FOR THE BOARD OF FISHERIES

The Alaska Board of Fisheries began its 2002 - 2003 regulatory cycle in October. In support of the board's work, the Department of Law participated in an orientation session for new board members, a non-regulatory work session, and a regulatory meeting. At the regulatory meeting, the board adopted management plans for king salmon sport fisheries in Lower Cook Inlet, the North Gulf Coast, and Kodiak. The board also considered, but postponed, adoption of a statewide trout policy. AAG Lance Nelson and Jon Goltz advised the board on various issues.

Oil, Gas & Mining

TAPS QUALITY BANK HEARING

Petroleum streams of differing qualities are commingled in the Trans Alaska Pipeline System (TAPS). The TAPS Quality Bank assesses charges against shippers of petroleum that is worth less than the commingled TAPS crude, and distributes compensatory payments to shippers of petroleum that is worth more. A dispute over the methodology used by the Quality Bank to compare the values of the different streams has been raging before the Federal Energy Regulatory Commission and the Regulatory Commission of Alaska or its predecessor since 1989. The state is a party in this case, represented by the Oil, Gas & Mining section. What one hopes will turn out to be the final hearing on the merits in the case, before FERC and RCA administrative law judges, began in mid-October and is now expected to run through January or later.

NEW JUNEAU LAW OFFICE ASSISTANT

The Juneau Oil, Gas & Mining section is happy to welcome Kara Winegar as Law Office Assistant. The section has been without an LOA for some time, and we are extremely happy to have the position filled. Kara has a degree is business and has worked in retail customer service. She brings great enthusiasm and energy to the job and is already helping the section operate more smoothly and efficiently.

Special Litigation

BOARD DENIES CLAIM FOR RETROACTIVE INCREASE IN PERMANENT IMPAIRMENT BENEFITS

The state paid a Department of Labor & Workforce Development employee permanent impairment benefits under the provisions of the Workers' Compensation Act in force at the time of his June 2000 injury. He then filed a claim for increased benefits, based upon a July 2000 amendment to the Act, which was denied by the state's adjusters.

AAG Paul Lisankie represented the state at the ensuing hearing before the Alaska Workers' Compensation Board. The state argued that, under the standards adopted by the Alaska Supreme Court, the amendment did not apply to claims based on injuries that occurred before July 2000. In its October 31, 2002, decision and order the board agreed with the state's position. It found the amendment was substantive in nature and the legislature had neither expressed nor reasonably implied a desire to apply it retroactively. Concluding that the state had properly calculated the benefits due, the board denied and dismissed the employee's claim for additional benefits.

ANCHORAGE JURY ALLOCATES ONE PERCENT FAULT IN SUIT AGAINST DEPARTMENT OF TRANSPORTATION

An Anchorage jury found the Department of Transportation one percent at fault in an accident on the Parks Highway in January 1998. On a curve, the teenaged driver, who admitted that she was not paying attention, drifted into the oncoming lane and struck an oncoming pickup truck. The jury allocated 90 percent fault to the teenaged driver, who was only slightly injured in the collision, and allocated nine percent fault to the driver of the oncoming pickup truck. The teenager's boyfriend was a passenger in the car and was seriously injured. He was the primary plaintiff in the lawsuit. The principal claim in the lawsuit was that the state did not maintain the road sufficiently to provide enough traction for the oncoming pickup truck driver to take effective evasive action. The state settled post-verdict for its one percent of the damages awarded by the jury, after application of the relevant caps for non-economic damages, inclusive of costs, fees, and interests. AAG Venable Vermont, Jr., defended DOTP&F in this case.

Transportation

STEINER NAMED VICE-CHAIR OF NATIONAL STEERING COMMITTEE

AAG John Steiner has been selected vice-chair of the Airport Council International – North America Legal Affairs Committee Steering Group.

AIRPORT CONCESSIONS ISSUED

AAG John Steiner helped the Ted Stevens Anchorage International Airport successfully issue car rental concession contracts and an advertising concession contract for advertising in airport terminals. The airport is proud the solicitations for these complex, high-dollar contracts drew no bid protests. Steiner also helped the airport develop pending requests for proposal for concessions for specialty retail/news and gift, ATMs, shoe shine, and relaxation massage.

COURT UPHOLDS AIRPORT FILL PROJECT

Superior Court Judge Tan upheld the Division of Governmental Coordination's determination that a permit to fill 218 acres of wetlands at the Ted Stevens Anchorage International Airport was consistent with the state's coastal zone

management program. Former AAGs Lisa Weissler and Shannon O'Fallon and AAG Kirsten Swanson represented the Division of Governmental Coordination. AAG Jim Cantor represented the airport.

DOT&PF UPDATING SAFETY GUIDELINES

AAG Gary Gantz reviewed DOT&PF's proposed safety manual. AAGs Bob Doehl, Kristen Knudsen, and Rob Royce contributed their expertise on tort, workers' compensation, and OSHA issues.

CONSTRUCTION CLAIM RESOLVED

AAG Gary Gantz helped settle a contractor's claim stemming from DNR's construction of the Matanuska Glacier Scenic Overlook.

AIRPORT LEASING REGULATIONS

Under a new regulation, 17 AAC 45.297, lessees on state airports may protest DOTP&F's periodic adjustments to the lease rent with a privately obtained appraisal. This regulation requires an appraiser for the lessee to "carry out the appraisal in accordance with instructions prepared by the [DOTP&F]". To develop the instructions, the Anchorage Transportation section office coordinated comments of agency personnel, combined various drafts, and used its expertise and experience from condemnation work. The instructions are now in place, and we hope they will provide consistency and fairness to the protest process.

Criminal Division

ANCHORAGE

Louie Crandall pled no contest to manslaughter for the drowning death of Wassille "Gabe" Jost. In 1997, Crandall accused Jost of molesting Crandall's two-year-old daughter. No charges were filed. In 1998, Crandall confronted Jost about the molesting, though Jost denied it. In 1999, police found Jost's body in a local lake. Investigation revealed that Crandall came home soaking wet the night Jost disappeared. Crandall confessed to a family member that he held Jost under the water and then filled his clothing with rocks so he would sink. In the week before trial was to begin, Crandall admitted to having had a role in the death of Jost. He claimed he was attempting to make a citizen's arrest after Jost confessed to the molestation and somehow Jost ended up dead. Sentencing is set for February.

William Zilys was sentenced on charges of felony DUI, assault in the second degree, and driving without a license. The judge sentenced Zilys to a composite of nine years in jail, as requested by the prosecution. Between 1988-1999, Zilys had 42 criminal convictions, many of them alcohol related. He walked away from an alcohol treatment facility the day before the crash.

A man was charged with murder in the second degree for the shooting death of his wife, which the defendant says occurred while he was changing scopes on his rifles. Although he normally kept the gun loaded, he said he did not think the gun was loaded at the time. He admitted that he had adjusted the trigger pull to four ounces and that he had his finger inside the trigger guard before the fatal shot. Bail was set at $100,000.

A man was charged with murder in the first degree for a 1998 homicide, providing the police with details only the killer would know. The murder was a bludgeoning death of an escort who would not accept an obviously fraudulent check. Bail was set at $100,000.

BARROW

A Barrow woman was acquitted of bootlegging after a four-day jury trial. The state's only eyewitness to the crime was a paid informant who purchased alcohol from the defendant in a

semi-controlled buy. Although the informant did not begin working with the police until February 2002, the judge allowed the defense to impeach the informant by inquiring into her arrests for DUI and domestic violence the previous year. The judge also refused to allow the state to expose the bias of a defense witness who gave her opinion that the informant was untruthful. The state held that the defense witness was biased because she had been used by the same informant during the same time frame as a unwitting go-between to purchase alcohol from the witness' best friend, who was subsequently indicted for bootlegging.

David Rexford was sentenced to a total of three years with all but three and a half months suspended for vehicle theft and DUI. Rexford stole a local restaurant delivery car, drove it while intoxicated, and wrapped it around a telephone. He told the police that he took the car because he didn't feel like walking. Rexford was also ordered to pay restitution to the vehicle owner, who had already won a civil default judgment against him for the damage.

BETHEL

Mike Walsh began work with this office on October 11as an Assistant District Attorney.

Edward Yako was convicted after a jury trial of tampering with a witness, assault in the fourth degree, violating a DVRO, and violating conditions of release. Niel Chiklak was found not guilty, after a jury trial, of the sale of liquor without a license.

Five people were indicted for various degrees of assault and seven for sexual assault. One person was indicted for sexual abuse of a minor, three for burglary, three for theft, six for bootlegging, and two for kidnapping. There was one case each of attempted murder, robbery, escape, felony criminal mischief, and felony indecent exposure.

FAIRBANKS

The big event for the Fairbanks DA's office was moving to newly remodeled space in the Northward Building. We are now only two blocks from the new courthouse, rather than nine. Our office manager and support staff did an incredible job of keeping things organized, and they even transferred our servers and computer systems when the Juneau weather grounded the technicians who were to assist in that part of the move. The new mailing address is 455 Third Avenue, Suite 150, Fairbanks, AK 99701. Phones stay the same. Special thanks to Juneau AAG Marilyn Kamm, who came up for a week to help cover court hearings during the move. At the last minute we advanced the move by four days, which turned out to be our best planning. The 7.9 earthquake on November 3 took out an elevator and caused some flooding in the old building two days after we moved our last boxes.

ADA Jay Hodges generated some revenue for the state when he successfully argued for forfeiture of a $50,000 bail bond on absconder Rodney Drake.

The grand jury indicted a man for multiple assaults of a nine-month-old baby with head injuries, broken ankles, and a broken arm. He said the child piled up toys and stuffed animals in his crib, climbed out, and fell on the padded floor.

Judge Hopwood came from Kodiak to do sentencing in a high-profile sexual assault/kidnapping case, in which a UAF varsity basketball player attacked his former girlfriend. The courtroom was packed with the defendant's supporters, and security was heightened after a knife was found in the hallway outside the court.

KENAI

An entire month was spent in two attempts at trying the case *State v. Billy Smith*, charged

with two counts of murder in the first degree for the disappearance of a couple in 1994. Both ended in a mistrial; the second attempt resulted in a hung jury. The case is set to begin again in January.

Travis Penniger was convicted of two counts of assault in the second degree and one count of assault in the fourth degree following a jury trial for his participation in an unprovoked random act of assault committed by him and his juvenile brother-in-law. The two had assaulted a pair of men riding their bikes along the road after yelling at the men to get out of the road. During the assault, Penninger kicked one of the cyclists in the face, breaking his jaw. He also struck the other cyclist on the back with a shovel. At trial, Penninger denied that he kicked the man in the jaw and claimed that he was defending his brother-in-law when he struck the man in the back with the shovel as the man was running down into a ditch with a large rock to strike Penninger's brother-in-law on the head. In rebuttal, the defendant's brother testified that the assault with the shovel occurred up on the road and that the victim did not have anything in his hands, nor was he running down into the ditch.

KETCHIKAN

Carl Abuhl was found guilty by a jury of murder in the second degree, after they rejected a defense of heat of passion. Abuhl was visiting a friend, and they got into an argument over the friend sharing drugs with Abuhl's girlfriend. Abuhl, it seems, was jealous and wanted to do everything with his girlfriend including sharing drugs with her. His friend was on a bed and had a bat next to him. He raised the bat to threaten Abuhl with it, and Abuhl took it away from him. He hit his friend in the head with the bat and knocked him out. He then sat on the bed talking to his friend about how his friend had harmed him and he then beat his friend's head in with the bat and killed him. He then put his friend's cat in the microwave and turned it on. The cat was able to get out, and Abuhl stomped on the cat, thinking he had killed it. The cat lived, although it suffered burns on his body requiring amputation of the ears and tail. Before trial, Abuhl pled guilty to cruelty to animals for his attack of the cat.

There were three other jury trials in Ketchikan in October. Gregory Benge was convicted by a jury of DUI. Christopher Ferguson, a doctor visiting from another state, was convicted by a jury of refusal but was found not guilty of DUI. Gregory Buxton was convicted by a jury of lesser offense of disorderly conduct and of interfering with a DV report.

The grand jury was also busy and indicted numerous individuals. One interesting indictment charged a man with four counts of tampering with a witness in the first degree for pressuring the DV sexual assault victim to recant. The Ketchikan prison records showed that there were 820 telephone calls to the victim from jail, most of them using other prisoners' identification numbers so the prison telephone system would allow the call to go through. Four calls were tape recorded.

Other individuals were indicted for misconduct involving controlled substances in the third and fourth degrees, fraudulent use of access device, hindering prosecution, felony DUI, and assault in the third degree.

KODIAK

A 50-year-old Kodiak man was sentenced to six years in prison, with three years suspended, and placed on probation for five years upon his conviction for assault in the second degree. In January of this year the defendant, who had no prior criminal charges or convictions, had threatened his victim (reported to owe the defendant thousands of dollars in a gambling debt) with a small .38 caliber auto-pistol. During a wrestling match for control of the gun the victim had his hand cut by a sharp edge of the gun’s slide mechanism. Somewhere along the way the gun fired and a bullet was found lodged in the passenger’s seat in the victim’s car.

A 19-year-old Kodiak woman was sentenced to serve 120 days in jail and ordered to pay a fine of $500 following her plea to misconduct involving a controlled substance in the third degree, a class B felony. She was also placed on probation for five years. She had been charged as an accomplice to her boyfriend co-defendant. The trial of her co-defendant is pending. Part of the sentencing agreement was that she testify against the co-defendant principal should his case proceed to trial.

A 40-year-old Kodiak man was sentenced to five months in jail and ordered to pay a fine of $1,000 following his plea to misconduct involving a controlled substance in the fourth degree, a class C felony. This defendant, who had been found to have marijuana growing in his home, was also placed on supervised probation for five years.

A 32-year-old Anchorage man was sentenced to three years with two years suspended, fined $5,000 with $4,000 suspended, and placed on probation for five years following his conviction for misconduct involving a controlled substance in the fourth degree. He was searched after he stepped off an incoming flight and found to have two ounces of cocaine on his person.

A 36-year-old Kodiak man was sentenced to 30 days in jail and placed on supervised probation for three years following his plea to criminal mischief in the second degree, a class C felony. In August of this year this local fisherman had spent several hours running his boat back and forth alongside the deployed net of another area fisherman in a successful attempt to disrupt the fishing operation of his competitor, who had refused to go to the beach and fight with him.

KOTZEBUE

A man was charged with several counts of sexual assault and sexual abuse of a minor. The victim was a younger sister who reported that he had been having sex with her for six years against her will. The man denied the offenses when interviewed by the troopers, but had admitted them to his girlfriend.

Also charged with sexual abuse of a minor was a Shungnak man, caught with a 14-year-old. The girl is attempting to cover for the defendant with a “nothing really happened” story, but the grand jury didn’t buy it.

An Ambler man was indicted for stalking in the first degree. He already has a first degree stalking conviction involving the same victim, and almost immediately resumed his criminal behavior after being released from custody on the prior offense.

An Ambler woman was also indicted for having stolen $1,800 worth of money orders from her employer at Red Dog Mine.

A Selawik woman was charged for assault in the third degree, reckless endangerment, and reckless driving after a boating accident outside of Selawik. She had been driving her boat at a high rate of speed around a corner of the river when her boat collided with another boat. The impact caused the woman's granddaughter to be thrown from the other boat. The girl was saved by a man who jumped in the water and rescued the girl. Witnesses smelled homebrew on the defendant's breath.

NOME

After a vehicular chase and then a foot chase, a man was arrested for vehicle theft, eluding, and DUI. The Nome police had observed the man drive a City of Nome vehicle over a stop sign at about 3 a.m. Another man was arrested on multiple counts of felony assault after he used a shotgun to threaten the village police in Gambell, who were responding to a domestic call. A man from St. Michael was indicted for multiple counts of felony assault under remarkably similar facts.

Matthew Moore was found guilty by a Nome jury of attempted sexual assault and burglary. A neighbor had heard the victim of the offense screaming for help and had forced his way into the residence, holding Moore down until the police arrived. This arrest was Moore's introduction to the adult system, as it occurred on his 18th birthday. He does have a lengthy juvenile record. The trial was interesting, with the defense attempting to get last-minute continuances and the defendant attempting to fire his lawyer. Moore's father attempted to interject himself into the proceedings, at one point seeking to be appointed as co-counsel (he is not a lawyer). He quickly withdrew that request when it started to look like the judge might actually grant it.

PALMER

Suzette Welton was sentenced to 99 years in prison for murdering one son and trying to kill another by setting fire to their duplex two years ago. At her sentencing, Welton told the judge she was innocent. Evidence in the trial showed she drugged her sons by spiking their drinks before deliberately setting the fire.

A man was indicted on the charge of sexual assault in the second degree for having sex with a woman who passed out after taking ecstasy and drinking alcohol.

Two men were indicted on the charge of robbery in the first degree for robbing a Tesoro store on Knik Goosebay Road using a large claw hammer as a weapon. The car being driven by one of the men was stopped by Wasilla police shortly after the robbery, and the other man was found in the trunk with the hammer, a bandanna, gloves, and a bag of money.

In addition, 15 other individuals were indicted on new felony charges during the month of October.

In support of a "phantom-driver defense" to felony DUI and refusal, a defendant testified to a jury that he had not driven. Rather, someone else, unmentioned that night, had pulled up to the apartment and taken off while the officers briefly lost sight of the vehicle. The jury re-listened to the tape at the scene where defendant denied erratic driving. Implying that a different vehicle must have been driving badly, he said, "I wasn't driving erratically! I was just driving from across the street!"

In a marijuana grower trial, the defendant contested the meaning of the word "plant." He confessed at the scene that he "real recently" harvested some of his plants, and the pots were left on an unheated porch. Despite being winter, they still were green and had oozing stumps with a few leaves still pliable. The defendant contested that these were "plants" (as viable living things), based on a recent appellate holding that old dead "rootballs" are not "plants." Defendant also contested whether fresh potted pot plant stumps were circumstantial evidence of the recently existing plants. Interestingly, the defendant had rejected a plea to two of the four co-equal counts, but admitted in closing to two counts and was convicted of three. That fourth "number of plants" count was then dismissed rather than being re-tried.

OSPA
(Office of Special Prosecutions & Appeals)

Personnel News

Jack Schmidt transferred from the Anchorage DAO misdemeanor unit to OSPA to become the new statewide Fish & Game prosecutor, and Andrea Powell transferred from the property unit to become the statewide bootlegging prosecutor. Welcome to OSPA, Jack and Andrea.

Prosecution News

RaeJean Bonham was sentenced for one consolidated count of misleading securities

filings. Bonham engaged in the worst pyramid scheme Alaska has ever seen. She defrauded investors into purchasing contracts that allegedly were for purchasing unused frequent flier miles in bulk. She told investors she could then sell those miles at an incredible profit and give returns of 50 to 70 percent. In reality, Bonham was barely breaking even, and she was using later investors to pay off earlier investors. When the pyramid collapsed, tens of millions of dollars had been lost. Bonham was able to avoid review by the state by filing misleading affidavits and documents with the Division of Securities. Despite the fact that Bonham had already received a five-year federal sentence for using the mail to promote this scheme, Judge Card added three years on top of that with a sentence of five years with two suspended.

Petitions & Briefs of Interest

Briefs of Interest

Invocation of right to remain silent. The state argues to the Alaska Supreme Court that a defendant's statement that "Well, I'm done talkin' then" upon learning that his co-defendant would eventually get a copy of his interview with the police was not in the circumstances an invocation of the right to remain silent, but an expression of fear, and that the officer could continue the interview with the defendant. Under Alaska law, the police do not have to clarify ambiguous statements regarding the right to remain silent, but do have to clarify ambiguous statements regarding the right to counsel. *State v. Munson*, S-10444.

Right to testify. The state argues to Alaska Court of Appeals that a defendant who agreed with his attorneys' recommendation that he should not testify at trial waived his right to testify under *Hurn v. State*, 872 P.2d 189 (Alaska App. 1994). The state maintains that the waiver was effective even though it was undisputed that the defendant's attorneys had not expressly told him that he could testify regardless of their advice. *Thompson v. State*, A-8043.

Effective date of felony DUI statute. The state argues that when the legislature enacts a law with a specific effective date but the governor doesn't sign the law until after that date, the law goes into effect immediately rather than 90 days later. This case involves the new DUI law, which the legislature said was to go into effect on July 1, 2002. The governor didn't sign the law until July 3. The defendant committed his offense on July 4. *Fowler v. State*, A-8254.

Court Decisions of Note - Alaska

Statute and Rule Interpretations

AS 11.41.220 – definition of fear. The court of appeals clarified that the fear required for a fear assault is not emotional fear, but an apprehension of the threatened danger. *Hughes v. State*, Op. No. 1835 (Alaska App., October 17, 2002).

Alaska Evidence Rule 801(d)(1)(A) – foundation for prior inconsistent statements. The court of appeals discussed the foundation requirement to introduce prior inconsistent statements under Alaska Evidence Rule 801(d)(1)(A) in a case involving a witness with apparently no memory of the events his prior statements described. *Wassillie v. State*, Op. No. 1836 (Alaska App., October 25, 2002).

AS 11.61.195(a)(1) – gun-drugs nexus. The court of appeals had previously held that AS 11.61.195(a)(1), which punishes possession of a gun during a drug crime, requires a nexus between the gun possession and the drug crime. The court of appeals clarified that the

gun possession must somehow aid, advance, or further commission of the drug crime and identified eight factors the fact-finder should evaluate in making the nexus determination. *Murray v. State*, Op. No. 1826 (Alaska App., September 13, 2002). (This summary was inadvertently left out of this section in the monthly report for September.)

AS 28.35.020(a)(2) – proof required that defendant had blood-alcohol level of 0.08 percent or higher at the time defendant drove. The court of appeals held that AS 28.35.030(a)(2), under which it is an offense to drive with a blood-alcohol of 0.08 percent or more, requires proof that the defendant's blood-alcohol level was 0.08 or greater at the time the defendant drove, not simply at the time the defendant took the chemical test. This holding was based in part on the absence of an indication from the legislature that it was seeking to prohibit 0.08 or greater intoxication at the time of the test. The court of appeals said, however, that the test result creates a rebuttable presumption that defendant's blood-alcohol level was at least as high at the time the defendant was driving. *Conrad v. State*, Op. No. 1831 (Alaska App., September 27, 2002). (This summary was inadvertently left out of this section in the monthly report for September.)